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No. 84-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Petitioner,

—against—

SEYMOUR GILLMAN, TRUSTEE IN BANKRUPTCY FOR SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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January 21, 1985

QUESTION PRESENTED

Did the Court of Appeals of the State of New York properly "reject as wholly without merit Con Edison's assertion that to apply third-party issue preclusion would be to deprive it of the due process to which it is constitutionally entitled" (62 N.Y.2d at 558) under the Fourteenth Amendment to the Constitution of the United States?

PARTIES BELOW

The party to the proceeding in the court below, in addition to the petitioner, was Seymour Gillman, Trustee in Bankruptcy for Sherry Tobacco Company, Inc. and Claremont-Madison Tobacco Corp.

The parties to the two separate but related proceedings in the court below, in addition to petitioner, were the following respondents: (i) Edward I. Koch, as Mayor of the City of New York, The

City of New York, New York City Health and Hospitals Corporation, New York City Off Track Betting Corporation, Board of Education of the City of New York, Board of Higher Education, City University of New York, New York City Housing Authority, Triborough Bridge and Tunnel Authority, New York City Transit Authority, Staten Island Rapid Transit Authority, Metropolitan Transportation Authority, The Long Island Railroad Company, Metropolitan Suburban Bus Authority, and Consolidated Rail Corporation; and (ii) Morris Goldstein and Ruth Goldstein.

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STATEMENT OF THE CASE

Seymour Gillman is the Trustee in Bankruptcy of both Sherry Tobacco Company, Inc. and Claremont-Madison Tobacco Corp., both of which were adjudicated bankrupt on or about November 2, 1977 in the United States District Court for the Southern District of New York. The bankrupts maintained their offices and warehouse at 2040 Harrison Avenue, Bronx, New York.

Beginning at approximately 9:30 P.M. on July 13, 1977, electrical power to 2040 Harrison Avenue, Bronx, New York ceased, and the "1977 Blackout" of all five boroughs of New York City and Westchester County commenced. Power was not restored until 25 hours later on July 14, 1977.

During the 25 hours of blackout, the bankrupts' businesses were destroyed by the looting and vandalism which took

place under cover of the darkness created thereby.

The Trustee in Bankruptcy commenced this action in the Supreme Court of the State of New York, County of New York, against Con Edison on or about September 17, 1978, seeking to recover damages sustained by the bankrupts which were forced out of business as a result of the vandalism and looting during the blackout. The Supreme Court, New York County, entered an order on August 26, 1982 granting the Respondent's motion for partial summary judgment on the issue of Con Edison's culpability for gross negligence on the theory of collateral estoppel (see Appendix to Petition for a Writ of Certiorari,p.72a).

The Appellate Division, First Department, affirmed on June 30, 1983 (95 A.D.2d 988), and the Court of Appeals of the State of New York unanimously

affirmed the decision of the Appellate Division on June 14, 1984 (62 N.Y.2d 936).

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO ESTABLISH THAT IT WAS DENIED DUE PROCESS OF LAW.

The unanimous decision by the court of appeals held "that the prior determination in Food Pageant[1] with respect to Con Edison's liability for gross negligence in connection with the 1977 blackout is binding and conclusive on Con Edison in this action" (62 N.Y. 2d at 558). Con Edison disputes this decision on the grounds that there exist other judicial determinations contrary to Food Pageant, and thus it was unfair to Con Edison to preclude it, under the doctrine of collateral estoppel, from relitigating the issue of gross negligence.

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1 Food Pageant, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167 (1981).

Con Edison argues that since the Food Pageant decision which is relied upon as a basis for the estoppel, is itself inconsistent with other legal determinations, this unfairness denies it the constitutional guaranty of due process.

The five inconsistent decisions, on which Con Edison sought to rely in the court of appeals and in this petition for a writ of certiorari, all arose out of cases tried in the Small Claims Part of the Civil Court of New York City.[2]

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2 Finkelstein v. Consolidated Edison Co.,N.Y.L.J.,May 1, 1979,p.13,col. 3 (Sup.Ct.App.T.2d Dep't 1979); Lee v. Consolidated Edison Co., 95 Misc.2d 120 (N.Y.C.Civ.Ct.N.Y.Co. 1978), rev'd on other grounds, 98 Misc.2d 304 (Sup.Ct.App.T.1st Dep't 1978); Lehman v. Consolidated Edison Co., N.Y.L.J.,March 25,1980, p.10,col.6 (Sup.Ct.App.T.2d Dep't 1980); Lo Vico v. Consolidated Edison Co., 99 Misc.2d 897 (Sup.Ct.App.T. 2d Dep't 1979); Penichet v. Consolidated Edison Co.,N.Y.L.J.,May 1,1980, p.7,col.2 (Sup.Ct.App.T.1st Dep't 1980).

As noted by the court of appeals, cases tried in Small Claims Part are governed by "informal and simplified procedures" and "by express statutory provision are not to be deemed an adjudication of any fact at issue (other than the amount involved) with respect to any other action" (62 N.Y.2d at 556). Thus, these decisions arising under Small Claims Part were not regarded as being "of like judicial stature" with Food Pageant, and therefore the contention of Con Edison based on such inconsistent judgments was dismissed. The court of appeals specifically reserved for a later time "the effect properly to be given to inconsistent determinations of like judicial stature..." (62 N.Y.2d at 555-556).

The two principal decisions cited by Con Edison in its petition are Parklane Hosiery Co. v. Shore, 439 U.S.

322 (1979) and State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976). By way of dictum, this Court in Parklane referred to the possibility of unfairness to a defendant resulting from the application of offensive collateral estoppel in situations of inconsistent judgments (439 U.S. at 330). The facts in Parklane did not, however, involve inconsistent judgments. The Court there held that the defendants were collaterally estopped by the earlier judgment in the District Court action brought by the Securities and Exchange Commission (SEC), since defendant had a "full and fair" opportunity to litigate their claims in the SEC action. In sum, the court of appeals followed Parklane in its decision below. Having found that there were no inconsistent determinations of like judicial stature and that Con Edison had

had a "full and fair opportunity to litigate the issue" in Food Pageant, the court of appeals applying Parklane held that the prior determination in Food Pageant "is binding and conclusive on Con Edison in this action" (62 N.Y. 2d at 558).

The Oregon case cited by Con Edison did involve inconsistent judgments arising out of a fire, but unlike this case, there was no suggestion in the State Farm Fire & Casualty decision that the multiple judgments there involved were not of "like judicial stature." The Oregon court held that it would be unfair to preclude the defendant from relitigating the liability issue because of the existence of prior inconsistent determinations. State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976).

Since there are no "previous judgments" inconsistent with the judgment in Food Pageant, which is relied upon as a basis for the offensive collateral estoppel, no issue of "unfairness," i.e., "due process," arises from the application of offensive collateral estoppel in this case. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

On yet another ground, Con Edison should not be heard to raise this issue of denial of due process. The New York City Civil Court Act provides for informal and simplified procedures to be applied in cases tried in Small Claims Part. Section 1806 of the Civil Court Act gives either party to an action upon a small claim the right to demand a trial by jury in the regular part of the civil court. Had Con Edison desired to ensure that all proceedings against it

growing out of the 1977 blackout be conducted in accordance with the customary court procedures and practices required by the constitutional guaranty of due process, Con Edison should have demanded, in each case sought to have been brought in the Small Claims Part, e.g., the five alleged inconsistent decisions cited supra note 2, a trial by jury in the regular part of the civil court. Having failed to do so, Con Edison cannot now be heard to complain that disregard of these five small claim decisions by the court of appeals here in the application of offensive collateral estoppel, was a violation of due process to which Con Edison is constitutionally entitled.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

January 21, 1985

Respectfully submitted,

IRVING SCHNEIDER
Attorney for Respondent

Of Counsel:

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